No. 89-7743

In The

Supreme Court of the United States

October Term, 1990

THADDEUS DONALD EDMONDSON,

Petitioner,

v.

LEESVILLE CONCRETE COMPANY, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

U.S. CONSTITUTION

TABLE OF AUTHORITIES – Continued

Page

STATUTES

REPLY BRIEF FOR PETITIONER

I. INTRODUCTION

This case presents three somewhat interrelated issues: (1) whether the constitutional rule in *Batson v. Kentucky*, 476 U.S. 79 (1986), applies to civil cases[1]; (2) whether federal statutes authorize the use of race-based peremptory challenges in federal civil cases, and (3) whether this Court in the exercise of its supervisory power should forbid the use of race-based peremptory challenges in federal civil cases.[2]

Because the brief for respondent deals primarily with the constitutional issue, this reply brief does so as well. In so doing we continue to maintain the statute at issue (28 U.S.C. 1870) does not authorize race-based peremptory challenges in civil cases. But, as the detailed analysis of the statutory issues set forth by an amicus[3] provide other equally compelling support for petitioner's position, we urge the Court to follow its well-established prudential practice and to reverse the decision below on the non-constitutional grounds.

Respondent suggests the trial court below found that the disputed peremptory challenges were not racially motivated. (R.Br. 3, 11, 89). Were this in fact the case, had

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[1] In addition to the briefs of the parties, this issue is discussed at length in the Brief Amicus Curiae of the American Civil Liberties Union.

[2] In addition to the briefs of the parties, the second two issues are discussed at length in the Brief Amicus Curiae of the NAACP Legal Defense and Educational Fund, Inc.

[3] *Id.*

the judge conducted the inquiry required by *Batson* then held that the jurors had been excused for a neutral, nonracial reason, the legal issues briefed by the parties would be moot. But the district judge expressly refused to conduct such an inquiry and never required or obtained from counsel for respondent "a neutral explanation for challenging black jurors" required by *Batson*, 476 U.S. at 97. The remarks of the trial judge on which respondent relies read:

> The court finds there is no discrimination, no violation of the law in the selection process. *And the motion to have the defendant articulate the reasons why he challenged the two black jurors is denied.*

(J.A. 52-53.) (Emphasis added) The finding of "no discrimination," as the rest of the sentence makes clear, is a finding of no *unlawful* discrimination since the trial judge believed respondent could legally use its peremptories to exclude jurors on the basis of race (J.A. 52-53). In any event the district judge, in declining even to ask counsel for respondent to explain the challenged peremptories, did not conform to the procedure mandated by *Batson*.

Respondent suggests the issue raised by this case "is an important one to every attorney who litigates civil cases in federal and state courts." (R.Br. 4). Actually, the effects of this Court's ruling are likely to be less widely felt. The issue will affect only civil cases in which one of the litigants is non-white. In a nation in which blacks remain disproportionately poor, they are only infrequently parties to cases which make up the gulf of jury trials in the U. S. District Court, such as commercial, copyright infringement, etc. With the exception of the

instant case and the Seventh Circuits recent decision in *Dunham v. Frank's Nursery & Crafts, Inc.*, 1990 WL 198907 (7th Cir. 1990) all federal civil cases in which *Batson* issues have arisen have in fact been civil rights claims.[4]

II. THE CONSTITUTIONAL RULE IN *BATSON V. KENTUCKY*, 476 U.S. 79 (1986), SHOULD BE APPLIED TO CIVIL CASES

Five years ago this court held in *Batson v. Kentucky* that "[i]n view of the heterogeneous population of our Nation, public respect for . . . the rule of the law will be strengthened if we ensure that *no* citizen is disqualified from jury service because of his race." 476 U.S. at 99. (Emphasis added). *Batson* was based on more than a century of decisions by this Court which "made clear that the Constitution prohibits *all forms* of purposeful racial discrimination in selection of jurors." 476 U.S. at 88. (Emphasis added) The constitutional question presented by this case is whether the Court will now hold that the Constitution actually permits some forms of purposeful racial discrimination in jury selection, and will rule as did the court below, that a black citizen may indeed be disqualified because of his or her race from service on a civil jury.

Nothing in *Batson* itself suggested there was to be an exception, in civil cases or any other type of proceeding, to the general principles announced by the Court. On the

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[4] Dunham v. Frank's Nursery & Crafts, Inc., 1990 WL 198907 (7th Cir. 1990). Brief Amicus Curiae of the NAACP Legal Defense and Educational Fund, Inc., pp. 22-23 n. 17.

contrary, much of the reasoning of *Batson* was and is fully applicable to the utilization of race-based peremptory challenges in civil cases. *Batson* and its progeny emphasized that the use of race-based peremptories to "purposefully exclude black persons from juries [would] undermine public confidence in the fairness of our system of justice." 476 U.S. at 87; see *Holland v. Illinois*, 107 L.Ed.2d 905, 922 (1990); *Allen v. Hardy*, 478 U.S. 255, 259 (1986). Such discrimination, *Batson* reasoned, would act as a "stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others." 476 U.S. at 88. Public confidence in the fairness of civil litigation, and the need to eliminate any potential source of prejudice against civil litigants of a particular race are assuredly as important as in criminal cases.

The court below held *Batson* was inapplicable to civil cases because it believed the racially-motivated exclusion of black jurors in such cases did not involve state action. The actual exclusion of black jurors in civil cases, in one respect, is undeniably state action. Neither federal nor state law permits an attorney to order a prospective juror to leave the jury box. Only a judge can issue such a directive. Where a judge, in response to the proposed exercise of a race-based peremptory challenge, directs a black juror to leave, the judge's order is obviously state action. The Fifth Circuit did not, of course, suggest otherwise. It reasoned that no constitutional violation occurred because, although the order itself was state action, the racial motive that gave rise to that order was attributable solely to the private lawyer representing a civil litigant.

Here, the Fifth Circuit departed from clear precedents of this Court.

This Court has repeatedly rejected suggestions that it treat as separate and distinct the government action which injured a black complainant, and the racial motives of private individuals who instigated it. In *Shelley v. Kraemer*, 334 U.S. 1 (1948), the court held that a state judge could not enforce at the behest of private parties a privately agreed upon racially restrictive covenant. In the Girard College case, *Pennsylvania v. Board of City Trusts*, 353 U.S. 230 (1957) the Court ruled that a state board could not implement the racially restrictive terms of a will creating a school limited to whites. On two occasions the Court has insisted a state could not carry out the provisions of a political party rule permitting only whites to vote in party primaries. *Terry v. Adams*, 345 U.S. 461 (1944); *Smith v. Texas*, 311 U.S. 128 (1940).

If the parties to a civil case entered into a written agreement that only whites would sit on the jury to hear their case, no federal or state judge could constitutionally implement it. A *fortiori*, a judge cannot do so where the exclusion of non-whites is sought by only one party, over the objection of the other, or where the attorney seeking that exclusion may attempt, without success, to mislead the judge as to his factual motive.

The result is no different if, as the Fifth Circuit suggested, the issue is recast as a question regarding whether the actions of the lawyer exercising the race-based peremptories are themselves state action. Under *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982), the question of

whether such an attorney's conduct may be fairly attributed to the state turns on two circumstances. First, the deprivation complained of "must be caused by the exercise of some right or privilege created by the State." 457 U.S. at 937. This first requirement is easily satisfied in the instant case; the peremptory challenge accorded to respondent, if federal law authorizes race-based peremptory challenges,[5] is a privilege created by federal statute. In the absence of that statute, 28 U.S.C. § 1870, counsel for respondent could not have obtained the removal of the prospective jurors at issue.

The second requirement set forth in *Lugar* is that

> the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise fairly chargeable to the State.

457 U.S. at 937. This requirement, too, is satisfied; counsel for respondent, in his attempt to remove the two jurors at issue, undeniably received significant, indeed essential, aid from the federal judge.

The power exercised by counsel for respondent in the district court procedure was inherently governmental because that attorney was, as a practical matter, exercising authority to hire or dismiss a federal official. If in the instant case, the district judge had advised the litigants

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[5] As we noted earlier, petitioner contends that federal law does not in fact authorize the use of race-based peremptory challenges.

he would fire any law clerk to whom they objected, and respondent had then asked the judge to dismiss a law clerk because he or she was black, the resulting dismissal would unquestionably have been unconstitutional government action. The same would be true if the district judge, at the behest of a racially-motivated litigant, had fired a black marshal, bailiff, or court reporter. The selection or removal of a government employee is an inherently governmental responsibility, regardless of whether the person exercising that power is himself on the government payroll.

Federal and state jurors while in that position are "public servants charged with important responsibilities." Edmonson en banc at p. 233, Rubin dissent. Federal jurors, along with members of Congress and of this Court, are among the small number of federal officials specifically referred to in the United States Constitution. Jurors are protected from threats and retaliation by the same provision of federal law that shields "officers in or of any court of the United States." 18 U.S.C. § 1503. And federal jurors are paid, albeit modestly, for their work. 28 U.S.C. § 1861. If it would be state action for counsel in a civil case to exercise control over the hiring and firing of ordinary court officials, the result is presumptively the same when that power is exercised over the selection of jurors.

In the instant case counsel for respondent utilized peremptory challenges to remove two black prospective jurors, Willie Combs and Wilton Simmons. Suppose Combs and Simmons had sued for the daily salary paid to federal jurors under 28 U.S.C. § 1861, and were able to prove that counsel for respondent had had them excused

solely because they were black. Such a showing would undeniably establish a compensable constitutional violation. If the racial motivation alleged by petitioner would be sufficient to establish a constitutional violation in an action by Combs and Simmons for lost compensation, surely that same allegation, if proven, would also be a constitutional violation in the instant action.

The en banc majority regarded the federal judge in this case as no more than a passive and powerless bystander. The exercise of race-based peremptories, the circuit court suggested, was a wholly private act of racial discrimination which, coincidentally, happened to occur in a United States Courthouse when a federal judge chanced to be in the room. This characterization ignores the pivotal responsibility of a district judge for the administration of justice in federal court. Moreover, the constitutional prohibition against racial discrimination has unique force and meaning where the discrimination touches the judicial process. The legislative history of the Fourteenth Amendment reflects an extraordinary preoccupation with the affirmative responsibility of the states to establish and safeguard a judicial process to which the newly freed slaves could resort for effective, fair and nondiscriminatory protection of their lives, liberty, and property.[6] Even if some degree of acquiescence in privately instigated discrimination might be constitutionally tolerable in other aspects of governmental affairs, such acquiescence is uniquely unconstitutional when it affects the

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[6] That history is set forth in detail in the Brief Amicus Curiae of the NAACP Legal Defense and Educational Fund, Inc., and the American Jewish Congress, in South Carolina v. Gathers, ___ L.Ed.2d ___ (1989), No. 88-305.

judicial process. The principles which lie at the very core of the Equal Protection clause and account for the use of the word "protection" in that guarantee, are equally applicable to the federal government. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

The scope of the state action requirement in the Fourteenth and Fifth Amendments must to some degree be read in light of the historical circumstances that prevailed when those provisions were adopted. The instant case involves as well in part the interplay between the Fifth Amendment prohibition against discrimination and the Sixth and Seventh Amendment rights to jury trial. In construing the Sixth and Seventh Amendments, this Court has paid particular heed to their historical backgrounds.

Peremptory challenges for criminal defendants, especially in capital cases, may be distinguishable from peremptory challenges in civil cases. Peremptory challenges for criminal defendants predated the Constitution by several hundred years, and were well recognized when the Fifth, Sixth, Seventh and Fourteenth Amendments were adopted. *See Swain v. Alabama*, 380 U.S. 202, 212-14 (1965). On the other hand, the legislative history of the Fourteenth Amendment suggests special problems may be presented where a state permits peremptory challenges to be utilized by defense counsel to obtain an all-white jury that would refuse to punish crimes committed against a black victim. For these reasons, as in *Batson* itself, it would appear prudent to defer any decision regarding the exercise of peremptory challenges by defense counsel in criminal cases. *See Batson*, 476 U.S. at 89 n.12.

But the application of *Batson* to civil cases present no such difficulties. As respondent correctly observes, peremptory challenges in civil cases were virtually unknown in the eighteenth century, and were not expressly provided for in federal cases until six years after Congress had approved the Fourteenth Amendment. (R.Br. 41) There is thus no historical basis for treating peremptory challenges in civil cases differently than any other form of state action.

III. THE STANDARD PROPOSED BY RESPONDENT WOULD BE UNWORKABLY COMPLEX

Certiorari was granted in this case to decide whether race-based peremptory challenges should be permitted in civil cases. Petitioner urges the Court to apply to all civil cases the same rule formulated in *Batson v. Kentucky*. The position advocated by respondent is considerably more complex. Respondent insists that the use of race-based peremptory challenges in *this* case is permissible, but acknowledges that in a variety of other civil cases such challenges would not or might not be constitutional.

(1) The dissenting opinion below relied heavily on *Shelley v. Kraemer*, 334 U.S. 1 (1948), and on the Girard College Case, *Pennsylvania v. Board of Trusts*, 353 U.S. 230 (1957). Judge Rubin argued that if a judge cannot enforce a race-based restrictive covenant, a judge cannot enforce a race-based peremptory challenge. Respondent insists that the instant case differs from *Shelley* because counsel for respondent below never expressly acknowledged to the judge that any challenge was racially motivated:

> In . . . *Shelley* . . . the state entity purposefully participated in discrimination . . . No one has suggested that the trial judge in this case, or federal district judges generally, *knowingly* participated in discrimination . . . The importance of the mental element of purposeful participation in *known* discrimination for determining the threshold issue of state action is what marks *Pennsylvania v. Board of Trusts*, 353 U.S. 230 (1957) . . . In *Board of Trusts* a [state board] . . . administered a trust and school established by the will of Stephen Gerard for "poor white male orphans." . . . The state appointed the Board and administered the trust and school with full *knowledge of the discriminatory purpose of the trust. That knowing participation* in the discriminatory action was the critical element . . .

(R.Br. 11-12) (Emphases added and omitted)

We agree that had counsel for respondent announced at trial and he was utilizing his peremptory challenges for the purpose of removing black jurors, the trial judge, by *knowingly* excluding minority jurors as challenged, would undoubtedly have violated the Fifth Amendment. Neither the state nor federal judges can knowingly make "available to such [counsel] the full coercive power of government to deny to petitioner[s], on the grounds of race of color," the right to trial by a jury from which members of his race have been deliberately excluded. *Shelley v. Kraemer*, 334 U.S. at 19. In this case, as in *Batson*, the lawyer exercising the disputed peremptories did not spontaneously admit to an invidious motive. If, however, the inquiry contemplated by *Batson* had occurred, and the court had discovered and found that counsel for respondent had acted for racial reasons, then the trial judge

would have been forbidden – on respondent's own view – from excluding the challenged jurors.

The central issue is whether the trial judge should have conducted such an inquiry. If, as respondent seems to agree, judicial knowledge of an invidious motive would preclude removal of the challenged jurors, a judge cannot deliberately avoid steps that might bring such knowledge to his attention. If judicial recognition of the motives of an objecting party would be dispositive, it would be as wrong for the judge to refuse to hold a *Batson* hearing as it would be for the judge, like Ulysses' crew, to plug his ears with wax in order to avoid hearing a litigant's confession of racial motive. Compare *Ham v. South Carolina*, 409 U.S. 524, 526-27 (1973).

In Respondent's view, it would be constitutionally irrelevant that black jurors were in fact being deliberately purged by peremptory challenge so long as the covert but invidious scheme was not patently obvious to a passive and credulous observer. Respondent suggests that the Fifth and Fourteenth Amendments require not that jurors in fact be selected without regard to race, but only that any statements volunteered by the attorney involved not inadvertently disclose what is actually going on. If there is any precedent for such an elevation of appearance over reality, it is not *Shelley* or the Girard College Case, but Milli Vanilli.

(2) Respondent repeatedly emphasizes that it is not suggesting *Batson* would be inapplicable to the use of peremptory challenges by a governmental litigant in a civil case. On the contrary, respondent's argument is

premised on its insistence that the instant case involves a private litigant[7] represented by a private attorney.[8]

Batson is by its very terms applicable to the exercise of peremptory challenges by the government in any case. The reasoning and holding of that decision clearly did not turn on the fact that *Batson* was a criminal rather than a civil case. On the contrary, this Court emphasized in *Holland v. Illinois*, 107 L.Ed.2d 905 (1990), that *Batson* had been decided under the Fourteenth Amendment – which applies with equal force to forbid discrimination in civil, criminal, or any other state proceeding – and not under the Sixth Amendment, which concerns only criminal cases. *Batson* merely applied to the exclusion of jurors by means of peremptory challenge the long-standing principle that "[e]xclusion of black citizens as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure" 90 L.Ed.2d at 80. A state could not enforce a statute forbidding blacks to sit as jurors in a civil case to which the state was a party. *Strauder v. West Virginia*, 100 U.S. 303, 305 (1880). A state is equally forbidden to achieve that goal through discrimination by "its administrative officer" or at "other stages in the selection process." *Batson*, 90 L.Ed.2d at 82.

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[7] R.Br. i ("nongovernmental litigant"), 4 ("nongovermental party"), 6 ("nongovernmental parties"), 8 ("nongovermental litigants"), 9 ("private parties"), 10 ("nongovernmental party"), 14 ("private litigants"), 21 ("nongovernmental parties").

[8] R.Br. 4 ("private attorneys"), 19 "(private counse[l]"), 20 ("nongovernmental attorneys").

But maintaining in civil case a distinction between governmental and nongovernmental litigants would be difficult, and this exception alone might well apply to a large proportion of all cases in which *Batson* issues arise. The exception would certainly include a section 1983 or other claim against a city or county, or against a governmental official in his or her official capacity. *See Brandon v. Holt*, 469 U.S. 464 (1985). This exception would probably encompass as well suits against officials or former officials in their personal capacities, and at least some suits against private parties represented by government, or government paid, attorneys. In the instant case the defendant is a private corporation, but federal jurisdiction exists solely because the cause of action arose on a federal facility at which the defendants acting on behalf of, and under contract to, the federal government. Were this Court to hold that the applicability of *Batson* to civil cases turns on the nature of any government ties of the parties, it would be necessary to remand this case to evaluate the degree of governmental connection to the incident giving rise to the claim at issue. Given the substantial state action in these cases deriving from the role of the trial judge in actually excluding the challenged jurors, even a modest degree of government connection to the objecting party would easily tip the scales, if such additional state involvement is indeed needed, to a finding of unconstitutional state action.

(3) Respondent expressly declines to address whether "Batson applies to parties in civil rights litigation," recognizing "that arguments can be made to distinguish their situation from that of a normal private litigant." (R.B. 6). The applicability of *Batson* to civil

rights cases is of considerable practical importance, since most of the federal civil cases in which *Batson* issues have arisen are in fact civil rights cases brought under the Civil Rights Acts of 1866 and 1987.[9]

Even if *Batson* does not apply in ordinary civil cases it certainly ought to apply in civil rights cases. This Court has expressly insisted that special steps be taken to guard against a racially tainted jury where "[r]acial issues . . . [are] inextricably bound up with the conduct of the trial". Compare *Ristaino v. Ross*, 424 U.S. 589, 597 (1976) with *Ham v. South Carolina*, 409 U.S. 524 (1973). Civil rights cases ordinarily involve enforcement of the Fourteenth Amendment, the Fifth Amendment, or of statutes which implement the principles of those Amendments. It would be strange indeed if the constitutional guarantees against discrimination themselves sanctioned discrimination in the very judicial proceedings initiated to end discrimination itself.

(4) Respondent apparently recognizing that race-based peremptory challenges could skew the jury selection process, suggests that "affording a greater number of peremptories to either plaintiff or defendant in civil cases, whether in a state or federal court, would violate equal protection." (R.Br. 44). But providing all parties an equal number of peremptories frequently will be insufficient to put the parties on a fair and equal footing.

In a jurisdiction in which similar numbers of blacks and whites are on the jury venire, giving the parties equal

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[9] Brief Amicus Curiae of NAACP Legal Defense and Educational Fund, Inc., pp. 22-23 n.17.

numbers of peremptories would afford to all sides a comparable opportunity to shape the racial composition of the jury. However, in the vast majority of state and federal courts blacks constitute only a minority, often a small minority, of the venire. Thus in the typical jury selection process a white litigant will be able to use his or her peremptory challenges to eliminate all blacks from the jury, while the black litigant quickly exhausts his or her challenges without being able to overcome the effect of that racial purge. In all but a handful of federal district courts there are ordinarily only one or two blacks on a typical jury panel; if white litigants are determined to use their three challenges to obtain an all white jury, black litigants, despite having an equal number of challenges, would be powerless to prevent that result. Under these circumstances a black litigant would be entitled to claim that even a nominally equal number of challenges put him or her at an intolerably unfair disadvantage.

Were this Court to hold that *Batson* does not apply to all civil cases, there would undeniably be a number of different types of civil cases in which *Batson* nonetheless would be controlling. We urge that those exceptions would be sufficiently numerous and broad as to largely eviscerate the underlying rule proposed by respondent. At the least, litigation about the scope of such exceptions will be complex, time consuming, and in all likelihood, interminable.

CONCLUSION

For the above reasons, the en banc decision of the court of appeals should be reversed.

Respectfully submitted

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